
TITLE 329 SOLID WASTE MANAGEMENT DIVISION

Proposed Rule
LSA Document #14-254**DIGEST**

Adds [329 IAC 1-2](#) concerning requests for restrictive covenants modifications and associated cost recovery measures for remediation projects described in [IC 13-23](#), [IC 13-24](#), [IC 13-25-4](#), and [IC 13-25-5](#). Effective 30 days after filing with the Publisher.

HISTORY

First Notice of Comment Period: July 16, 2014, Indiana Register (DIN: [20140716-IR-329140254FNA](#)).

Second Notice of Comment Period: August 12, 2015, Indiana Register (DIN: [20150812-IR-329140254SNA](#)).

Notice of First Hearing: August 12, 2015, Indiana Register (DIN: [20150812-IR-329140254PHA](#)).

Date of First Hearing: October 14, 2015.

PUBLIC COMMENTS UNDER [IC 13-14-9-4.5](#)

[IC 13-14-9-4.5](#) states that a board may not adopt a rule under [IC 13-14-9](#) that is substantively different from the draft rule published under [IC 13-14-9-4](#), until the board has conducted a third comment period that is at least 21 days long. Because this proposed rule is not substantively different from the draft rule published on August 12, 2015, DIN: [20150812-IR-329140254SNA](#), the Indiana Department of Environmental Management (IDEM) is not requesting additional comment on this proposed rule.

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

IDEM requested public comment from August 12, 2015, through September 11, 2015, on IDEM's draft rule language. No comments were received during the second comment period.

SUMMARY/RESPONSE TO COMMENTS RECEIVED AT THE FIRST PUBLIC HEARING

On October 14, 2015, the Environmental Rules Board (board) conducted the first public hearing/board meeting concerning the development of amendments to [329 IAC 1](#). Comments were made by the following parties:

Tom Barnett, AcelorMittal Indiana Harbor

Following is a summary of the comments received and IDEM's responses thereto:

Comment: Mr. Barnett is not opposed to rulemaking, but is worried about not being able to anticipate costs up front. He suggested that IDEM review other states and their processes, highlighting that Illinois has a clear process for getting no-further-action letters. He also suggests IDEM consider a work group to go over the rule language.

Response: [IC 13-14-2-9](#) specifically authorizes cost recovery for IDEM's work on restrictive covenant modifications, not a fee based system typically used when permits are issued. IDEM did explore Illinois' procedures as suggested by Mr. Barnett, which uses a prepayment or estimate system for recovery of costs. IDEM plans to conduct further research and consider providing a non-binding estimate of the costs to modify a restrictive covenant. These estimates will likely be similar to the estimates provided under the voluntary remediation program. IDEM does not feel that a request for clarifications rises to the level of a work group.

[329 IAC 1-2](#)

SECTION 1. [329 IAC 1-2](#) IS ADDED TO READ AS FOLLOWS:

Rule 2. Restrictive Covenants**[329 IAC 1-2-1](#) Applicability**

Authority: [IC 13-14-2-9](#); [IC 13-25-4-1](#); [IC 13-25-4-2](#)

Affected: [IC 13-11-2-193.5](#); [IC 13-14-2-9](#); [IC 13-23](#); [IC 13-24](#); [IC 13-25-4](#); [IC 13-25-5](#)

Sec. 1. This rule applies to the owner of a property:

(1) that is subject to a restrictive covenant, as defined in [IC 13-11-2-193.5](#), created in connection with a remediation project conducted under:

(A) [IC 13-23](#);

- (B) [IC 13-24](#);
- (C) [IC 13-25-4](#); or
- (D) [IC 13-25-5](#); and
- (2) for which the owner seeks approval from the department to:
 - (A) modify a restriction or obligation; or
 - (B) terminate a restrictive covenant.

(Solid Waste Management Division; [329 IAC 1-2-1](#))

[329 IAC 1-2-2](#) Definitions

Authority: [IC 13-14-2-9](#); [IC 13-25-4-1](#); [IC 13-25-4-2](#)

Affected: [IC 13-11-2](#); [IC 13-14-2-9](#)

Sec. 2. (a) In addition to the definitions in [IC 13-11-2](#), the definitions in this section apply throughout this rule.

(b) "Applicant" means a person who applies for a modification or termination of a restrictive covenant.

(c) "Modification" means any amendment to a restrictive covenant subject to this rule that results in a remaining restriction or obligation to the owner of the property.

(c) "Owner" means the owner of real property subject to a restrictive covenant.

(d) "Termination" means the expiration of the restrictive covenant and cessation of all terms of the restrictive covenant.

(Solid Waste Management Division; [329 IAC 1-2-2](#))

[329 IAC 1-2-3](#) General provisions

Authority: [IC 13-14-2-9](#); [IC 13-25-4-1](#); [IC 13-25-4-2](#)

Affected: [IC 13-14-2-9](#)

Sec. 3. An owner may request a modification or termination in accordance with [IC 13-14-2-9](#) if:

- (1) there is a change in conditions or advancement in science or technology that would permit a modification; and
- (2) the modification of the conditions and restrictions imposed by the restrictive covenant would not increase the potential hazards to human health or the environment.

(Solid Waste Management Division; [329 IAC 1-2-3](#))

[329 IAC 1-2-4](#) Modification or termination application

Authority: [IC 13-14-2-9](#); [IC 13-25-4-1](#); [IC 13-25-4-2](#)

Affected: [IC 13-14-2-9](#)

Sec. 4. (a) An application for modification or termination of a restrictive covenant must be submitted to the commissioner on forms provided by the department. To be considered complete, the following information must be included:

- (1) A copy of the proposed modification or termination.
- (2) An explanation of the change in condition or advancement of science and technology that permits the modification or termination.
- (3) Third party contact information based on:
 - (A) required approvals from the original restrictive covenant; or
 - (B) approval required by a court action.
- (4) A copy of written approval for the requested modification or termination from:
 - (A) the property owner, if different than the applicant; and
 - (B) any third party as required by:

- (i) the original restrictive covenant; or
- (ii) a court action.

(b) In accordance with [IC 13-14-2-9\(c\)](#), the commissioner may request additional information to make a determination on the modification or termination request.

(Solid Waste Management Division; [329 IAC 1-2-4](#))

[329 IAC 1-2-5](#) Action on an application

Authority: [IC 13-14-2-9](#); [IC 13-25-4-1](#); [IC 13-25-4-2](#)

Affected: [IC 13-14-2-9](#)

Sec. 5. (a) The commissioner shall approve a request for modification or termination of a restrictive covenant if the commissioner determines that the modification or termination meets the requirements of:

- (1) [IC 13-14-2-9](#); and
- (2) this rule.

(b) The commissioner may authorize the filing of a supplemental recording to reflect an approved modification or termination of a restrictive covenant pursuant to [IC 13-14-2-9\(c\)](#). A supplemental recording must comply with section 6 of this rule.

(Solid Waste Management Division; [329 IAC 1-2-5](#))

[329 IAC 1-2-6](#) Submittal of supplemental recording

Authority: [IC 13-14-2-9](#); [IC 13-25-4-1](#); [IC 13-25-4-2](#)

Affected: [IC 13-14-2-9](#)

Sec. 6. (a) All restrictive covenant modifications and terminations must be recorded in the same manner and with the same county recorder as the original restrictive covenant.

(b) The owner shall provide a copy of the supplemental recording to the department within thirty (30) days of the recordation.

(Solid Waste Management Division; [329 IAC 1-2-6](#))

[329 IAC 1-2-7](#) Cost recovery

Authority: [IC 13-14-2-9](#); [IC 13-25-4-1](#); [IC 13-25-4-2](#)

Affected: [IC 13-14-2-6](#); [IC 13-14-2-9](#)

Sec. 7. (a) In accordance with [IC 13-14-2-9\(d\)](#), the applicant shall reimburse the department for the administrative and personnel expenses incurred by the department in evaluating a proposed modification or termination of a restrictive covenant under this rule.

(b) Administrative expenses must include any expense to the department related to the review of the modification or termination request that would not have otherwise been incurred by the department.

(c) Personnel expenses must include the cost per hour of the time the department employee expends in evaluating the proposed modification or termination request. The hourly rate shall be based upon and adjusted by the Midwest region urban zone consumer price index*.

(d) The department shall send an invoice to the owner for personnel and administrative costs to the department.

(e) Failure to reimburse the department for expenses incurred by the department in evaluating a

proposed modification or termination of a restrictive covenant under this rule may result in:

- (1) denial of the modification or termination; or**
- (2) legal action under [IC 13-14-2-6](#).**

***Information regarding the Midwest region urban zone consumer price index may be obtained from <http://www.bls.gov/cpi/>**

(Solid Waste Management Division; [329 IAC 1-2-7](#))

[Notice of Public Hearing](#)

Posted: 12/23/2015 by Legislative Services Agency

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